

## LIS PENDENS AS THE SOLUTION OF JURISDICTIONAL CONFLICTS

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The contribution deals with the principle of so called *lis pendens*, which states that the jurisdiction is kept by the institution which is the first seized of the proceeding involving the same cause of action between the same parties. Thus, *lis pendens* is one way of dealing with the problem of positive conflicts of jurisdiction in international procedural law. Positive conflict of jurisdiction means that two or more courts of different countries have considered that they are competent to hear and decide the dispute. But, parallel proceedings are unwanted, because it is possible that two incompatible decisions are the result of these proceedings. *Lis pendens* is based on the time aspect. The time aspect of the initiation of the proceeding prevails (the proceeding which is initiated later should be stayed until the jurisdiction of the first seized court is established). The question of *lis pendens* will be addressed from the perspective of international divorces of a marriage. The aim of this contribution is to analyse the regulation of *lis pendens* in international divorce proceedings and outline how *lis pendens* helps in resolving positive jurisdictional conflicts.

**Keywords:** *Lis pendens*, International divorce, Jurisdictional conflict.

### Introduction

For the purposes of this article we will only deal with conflicts between state courts in international divorce proceedings (also conflicts of jurisdiction between state court and arbitration court or between two or more arbitration courts are possible, but arbitration is not in place in divorce proceedings).

Jurisdictional conflicts in procedural international law are conflicts over which institution has the power to decide the dispute. Jurisdictional conflicts can be divided into positive and negative. Negative jurisdictional conflict means that there is no court in which jurisdiction can be established. *Lis pendens* is a way of dealing with the problem of two or more proceedings which could be held before different national courts (of different countries). Thus, we will only consider positive conflicts of jurisdiction which mean that there are two or more courts (of different states) in which the action is brought or in which jurisdiction can be established.

### *Lis pendens*

First, it will be briefly described what *lis pendens* is. There is no uniform definition in international or national instruments. But, we can say that it is one of the principles of civil procedural law. The aim of this principle is to prevent parallel proceedings in the same case (which mean the same subject matter

between the same parties).<sup>1</sup> *Lis pendens* (and *res iudicata*) is the expression of the principle *ne bis in idem*.<sup>2</sup>

Further condition for the application of this principle is the duration of the proceedings (the first proceeding has to be initiated, but not terminated) – first-in-time rule. *Lis pendens* is based on the time aspect. It is objective, simple, predictable rule, establishing legal certainty. The time aspect of the initiation of the proceeding prevails although there could be some other criteria that would determinate a more appropriate forum. The principle of *lis pendens* sets that the proceeding which is initiated later should be stayed until the jurisdiction of the first seised institution is established. The first-in-time rule has the effect especially before European civil courts.<sup>3</sup>

The disadvantage of *lis pendens* is that it partially supports *forum shopping*. The party which brings the action as the first one may choose the forum which is better for that party. The *lis pendens* rule prevents the other party to act differently.<sup>4</sup>

The principle of *lis pendens* sets quite strict rule. There is not too much space for the discretion.<sup>5</sup> In common law another approach is accepted for solving parallel proceedings. It is the doctrine of *forum non convenience*. The courts have the power to consider which forum is more appropriate for the particular case.<sup>6</sup> The similar rule contains the UNIDROIT Principles of Transnational Civil Procedure<sup>7</sup> which stays that the jurisdiction may be declined if the court is manifestly inappropriate. The court is not bound to decline jurisdiction when the dispute is previously pending in another competent court if it seems that the dispute will not be resolved fairly or effectively.

The reasons why parallel proceedings are unwanted are: it is possible that the two incompatible decisions are the result of these proceedings, courts are unnecessarily burdened and it is disadvantageous also for the parties because it is more expensive and more time consuming. The new action in the same case is waste of time and money.<sup>8</sup>

The obstacle of *lis pendens* is regulated under national laws. Section 83 of the Czech code of civil procedure<sup>9</sup> stays that the initiation of the proceeding prevents other proceeding before a court was carried out in the same case.<sup>10</sup> Possible dispute about the question which court is authorized to decide the case is

<sup>1</sup> *Final Report on Lis pendens and Arbitration* [online]. International Law Association. Toronto Conference (2006). International Commercial Arbitration, p. 2 [cit. 2017-07-20].

<sup>2</sup> BRENGESJÖ, Emil. *Lis Alibi Pendens in International Arbitration. Reflections on the Swedish Position in the Context of International Trends and Approaches* [online]. Stockholm University, Faculty of Law, 2013, pp. 12, 15 [cit. 2017-07-20].

<sup>3</sup> *Final Report on Lis pendens and Arbitration* [online]. International Law Association. Toronto Conference (2006). International Commercial Arbitration, p. 7 [cit. 2017-07-20].

<sup>4</sup> PAILLI, Giacomo. *Lis Alibi Pendens within Europe: Is There a Way Out of the „First in Time” Rule? (April 1, 2013)* [online]. Social Science Research Network, p. 3 [cit. 2017-07-20]. WALKER, Janet. *Parallel Proceedings – Converging Views: The Westec Appeal* (October 18, 2000). In *Canadian Yearbook of International Law*, 2000 [online]. Social Science Research Network, pp. 167 – 168 [cit. 2017-07-20].

<sup>5</sup> MAGNUS, Ulrich; MANKOWSKI, Peter. *Brussels I Regulation*. München: Sellier. European Law Publishers, 2012, pp. 567 – 568.

<sup>6</sup> BRAND A. Ronald. *Challenges to Forum Non Convenience*. *New York University Journal of International Law and Politics (JILP)* [online]. University of Pittsburgh School of Law, Vol. 45, 2013, pp. 1009 – 1010 [cit. 2016-03-18]. VICUNA, Francisco Orrego. *Lis Pendens Arbitralis* [online]. International Council for Commercial Arbitration, p. 7 [cit. 2017-07-20].

<sup>7</sup> Article 2.5 ad 2.6 of the UNIDROIT Principles of Transnational Civil Procedure [online]. *International Institute for the Unification of Private Law* [cit. 2017-07-20] (“ALI”).

<sup>8</sup> CALAMITA, N. Jansen. *Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings*. *Journal of International Law* [online]. Vol. 27, Issue 3, 2006, p. 610 – 611 [cit. 2017-07-20]. SCHÜTZE, Rolf A. *Ausgewählte Probleme des internationalen Zivilprozessrechts*. Berlin: De Gruyter Recht, 2006. p. 138.

<sup>9</sup> CZECH REPUBLIC. Act No. 99/1963 Coll., code of civil procedure.

<sup>10</sup> Decision of the Supreme Court of the Czech Republic of 28 January 2010, No. 22 Cdo 1974/2008 [online]. In *Nejvyšší soud* [cit. 2017-07-20].

decided by superior court. If the proceeding is terminated by one of the state courts, the proceeding before the second court still subjects to the same legal system (same procedural law). This is different in international proceedings.

At the international level there is a problem that there is not the central authority that would solve the competence dispute. In the international environment, the problems associated with *lis pendens* is therefore more difficult to solve.

### Regulation of *Lis Pendens* in Private International Law

However international arbitration is quite widespread, it is focused on property disputes, not on international divorces. Thus, on this place, we will only describe the regulation of *lis pendens* between state courts of different countries.

Section 8(1) of the Private International Law Act<sup>11</sup> provides that the Czech courts shall act in proceedings under the Czech procedural provisions. This means the Czech code of civil procedure will apply by the Czech courts including the Section 83. But, in proceedings with an international element solved by the Czech courts a little bit different regulation could be applied according to Section 8(2) of PILA: *“Proceedings initiated in another state shall not prevent from initiating proceedings on the same cause of action between the same parties before a Czech court. If the initiation of proceedings before the Czech court occurred later than the one in another state, the Czech court may, in justified cases, stay the proceedings should it be assumed that a foreign body’s decision is to be recognized in the Czech Republic.”*<sup>12</sup> Opposite to the domestic regulation, the Czech courts are not strictly instructed to terminate proceedings if they initiated proceedings later than a foreign court. They have the possibility to terminate the proceedings. The important factor for that is the presumption that it will be possible to recognize and execute the foreign decision in the Czech Republic.<sup>13</sup> If it is evident that the foreign judgment could not be recognized than it would be pointless to terminate proceedings before the Czech court.

Relationships between the courts, on the level of European Union, are regulated by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“Brussels Ibis Regulation”). This regulation contains, among others, the regulation of *lis pendens* and related actions.<sup>14</sup> But, it is applicable only to civil and commercial matters. Jurisdiction of matrimonial matters (including divorces) is regulated by Council regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (“Brussels IIbis Regulation”).

In Brussels Ibis Regulation the bar of *lis pendens* is regulated by Article 19 which stays: “Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.” This adjustment is not as detailed as the adjustment of Brussels Ibis Regulation but some provisions or their meanings are also applicable for purposes of Brussels Ibis Regulation. For unified interpretation and application of Brussels Ibis Regulation the case law of Court of Justice of the

<sup>11</sup> Czech republic. Act No. 91/2012 Coll., on private international law (“PILA”).

<sup>12</sup> The text of PILA was translated by Petr Bříza and Ondřej Trubač.

<sup>13</sup> Belloňová, Pavla. § 8 Základní ustanovení. In Pauknerová, Monika; Rozehnalová, Naděžda; Zavadilová, Marta a kol. (eds.). *Zákon o mezinárodním právu soukromém. Komentář*. Praha: Wolters Kluwer ČR, 2013. p. 73 – 75. Břicháček, Tomáš. § 8 Základní ustanovení. In BŘÍZA, Petr; BŘICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana a kol. (eds.). *Zákon o mezinárodním právu soukromém. Komentář*. Praha: C. H. Beck, 2014. p. 68 – 70.

<sup>14</sup> Article 29 – 34 of the Brussels Ibis Regulation.

European Union is available.<sup>15</sup> Made accessible case law could be also useful for interpretation and application of Brussels Ibis Regulation.

There are also bilateral agreements which regulate lis pendens between courts of contracting states.

### Causes of Jurisdictional Conflicts

One of the main causes of conflicts of jurisdiction is the absence of uniform legislation. National courts apply rules of their *forum* (of their state) for determining jurisdiction. But, criterions for determining jurisdiction are different in individual national legal orders (nationality of spouses, habitually residence and so on). Because of that, the courts of different states can make different conclusions as to which one is competent to resolve the dispute (positive jurisdictional conflicts).

Unified legislations (like bilateral contracts or Brussels Regulations) partially eliminate jurisdictional conflicts by laying down uniform rules. However, conflicts of jurisdiction cannot be completely excluded. Brussels Ibis Regulation does not provide only one rule for determining jurisdiction in divorce proceedings. There are more rules which can lead to determination of courts of different states.<sup>16</sup> These rules are equal, there is no hierarchy. Thus, we can again talk about positive jurisdictional conflicts.

### Lis Pendens as the Solution

There are more possible ways how to deal with the problem of positive conflicts of jurisdiction. One of them is unification. As we already said, one of the main causes of jurisdictional conflicts is the absence of uniform legislation and the application of different national rules by courts. Unified legislation would eliminate using of different criterions. But, uniform legislations like Brussels Ibis Regulation do not prevent jurisdictional conflicts at all. There more equal rules and it is possible that one court applies different rule than foreign court. And thus, the result may be different.

Positive conflicts of jurisdiction could be solved by determination of just one uniform rule (exclusive jurisdiction)<sup>17</sup>. Exclusive jurisdiction is used in proceedings which have as their object rights *in rem*. But, it is impossible to set only one criterion for international divorces which would regulate all possible situations. And exclusive jurisdiction would lead to negative jurisdictional conflicts.

National regulations (for example Czech law) and international regulations (including EU law) envisage that there will be positive conflicts of jurisdiction. For these cases continental law uses the principle of lis pendens as the solution. It is quite simple predictable rule which is based on time aspect. It is possible that both parties (spouses) bring the action before courts of different states. Then it is necessary to consider which proceeding was initiated first and the proceeding which was initiated later should be stayed until the jurisdiction of the first seised institution is established. It is clear instruction for courts in these situations.

### Conclusion

It is possible that in proceedings of international divorces of marriage arise positive conflicts of jurisdiction which means that two or more courts can establish their jurisdiction. Principle of lis pendens emphasizes the proceedings which was initiated the first. If the case of the same action between the same parties is brought before one institution and then is resubmitted to another one, the latter should terminate the proceedings.

<sup>15</sup> *Cyria* [online]. Court of Justice of the European Union [cit. 2017-07-25].

<sup>16</sup> Article 3 of Brussels Ibis Regulation.

<sup>17</sup> For example: Article 24 of Brussels Ibis Regulation. § 68 of PILA.

It is impossible to completely prevent positive jurisdictional conflicts but we can say that *lis pendens* is quite good solution which is widely accepted (mainly) by European courts.

## References

### Literature

1. Magnus, Ulrich; Mankowski, Peter. *Brussels I Regulation*. München: Sellier. European Law Publishers, 2012, 972 p. ISBN 978-3-86653-142-0.
2. Schütze, Rolf A. *Ausgewählte Probleme des internationalen Zivilprozessrechts*. Berlin: De Gruyter Recht, 2006, 357 p. ISBN 3-89949-331-1.

### Chapters in Book, Articles, Conference Papers

1. Belloňová, Pavla. § 8 Základní ustanovení. In Pauknerová, Monika; Rozehnalová, Naděžda; Zavadilová, Marta a kol. (eds.). *Zákon o mezinárodním právu soukromém. Komentář*. Praha: Wolters Kluwer ČR, 2013. p. 73 – 76. ISBN 978-80-7478-368-5.
2. Brand A. Ronald. Challenges to Forum Non Convenience. *New York University Journal of International Law and Politics (JILP)* [online]. University of Pittsburgh School of Law, Vol. 45, 2013, pp. 1002 – 1035. Available from: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2288697](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2288697)
3. Brengesjö, Emil. *Lis Alibi Pendens in International Arbitration. Reflections on the Swedish Position in the Context of International Trends and Approaches* [online]. Stockholm University, Faculty of Law, 2013. Available from: <http://www.diva-portal.se/smash/get/diva2:661930/FULLTEXT01.pdf>
4. Břicháček, Tomáš. § 8 Základní ustanovení. In Bříza, Petr; Břicháček, Tomáš; Fišerová, Zuzana a kol. (eds.). *Zákon o mezinárodním právu soukromém. Komentář*. Praha: C. H. Beck, 2014. p. 67 – 72. ISBN 978-80-7400-528-2.
5. Calamita, N. Jansen. Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings. *Journal of International Law* [online]. Vol. 27, Issue 3, 2006, p. 601 – 680. Available from: <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1198&context=jil>
6. Janečková, Pavčina. *Lis Pendens Before National and Arbitration Courts*. *International Journal of Multidisciplinary Thought*, 2017, vol. 6, (1), p. 291 – 299. Available from: <http://www.universitypublications.net/ijmt/0601/pdf/R6ME390.pdf>
7. Pailli, Giacomo. *Lis Alibi Pendens within Europe: Is There a Way Out of the „First in Time” Rule? (April 1, 2013)* [online]. Social Science Research Network, 9 p. Available from: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2276572](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2276572)
8. Vicuna, Francisco Orrego. *Lis Pendens Arbitralis* [online]. International Council for Commercial Arbitration, 14 p. Available from: [http://www.arbitration-icca.org/media/4/32472823740148/media012224290630120lis\\_pendens\\_arbitralis.pdf](http://www.arbitration-icca.org/media/4/32472823740148/media012224290630120lis_pendens_arbitralis.pdf)
9. Walker, Janet. Parallel Proceedings – Converging Views: The Westec Appeal (October 18, 2000). *Canadian Yearbook of International Law*, 2000 [online]. Social Science Research Network, pp. 155 – 188. Available from: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1490659](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1490659)

### Electronic Sources

1. *Cvria* [online]. Court of Justice of the European Union. Available from: <https://curia.europa.eu/>
2. *Final Report on Lis pendens and Arbitration* [online]. International Law Association. Toronto Conference (2006). International Commercial Arbitration. Available from: <https://academic.oup.com/arbitration/article-abstract/25/1/3/208210/ILA-Final-Report-on-Lis-Pendens-and-Arbitration?redirectedFrom=PDF>

### Court Decisions

1. Decision of the Supreme Court of the Czech Republic of 28 January 2010, No. 22 Cdo 1974/2008 [online]. In *Nejvyšší soud*. Available from:  
[http://www.nsoud.cz/Judikatura/judikatura\\_ns.nsf/WebSearch/0F88A869A6BB6381C1257A4E0066B338?openDocument&Highlight=0](http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/0F88A869A6BB6381C1257A4E0066B338?openDocument&Highlight=0),

### Legal Acts

1. Czech Republic. Act No. 99/1963 Coll., code of civil procedure.
2. Czech Republic. Act No. 91/2012 Coll., on private international law.
3. Council regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [online]. In *EUR-Lex*. Available from:  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:338:0001:0029:en:PDF>
4. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [online]. In *EUR-Lex*. Available from:  
<http://eur-lex.europa.eu/legal-content/CS/TXT/PDF/?uri=CELEX:32000L0031&rid=1>
5. UNIDROIT Principles of Transnational Civil Procedure [online]. *International Institute for the Unification of Private Law*. Available from: <http://www.unidroit.org/instruments/transnational-civil-procedure>